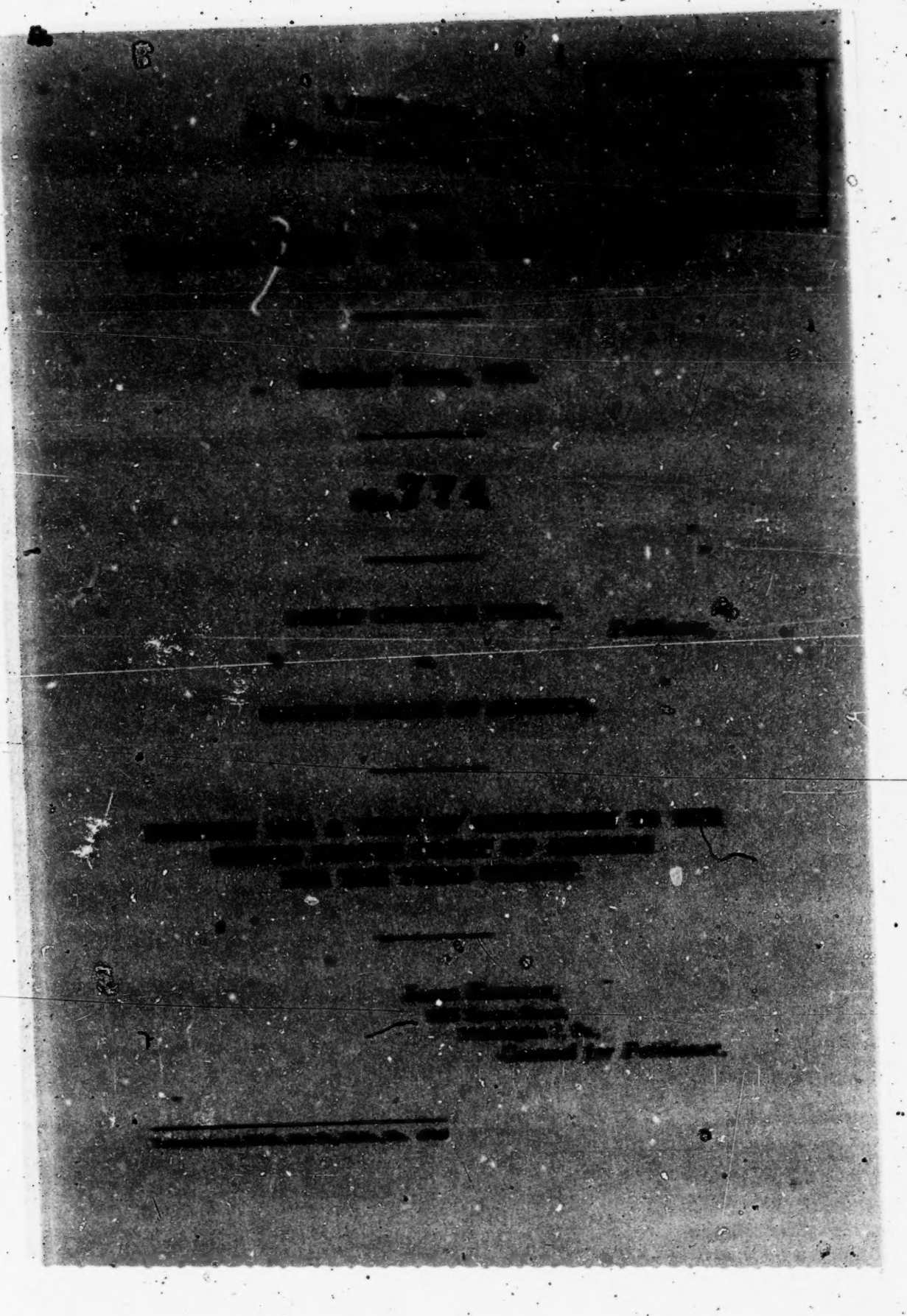

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No.

PHILIP CHARLES TESTA,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Philip Charles Testa, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled cause on November 8, 1963.

OPINION BELOW.

The per curiam opinions of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, pp. 1a-2a) are not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 8, 1963 (Appendix B, *infra*, p. 14a), and a timely petition for rehearing was denied on January 14, 1964 (Appendix B, *infra*, p. 15a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the order of the district court committing the petitioner until he has purged himself of contempt by testifying before a grand jury became unenforceable here when that grand jury returned an indictment against him.

2. Whether petitioner may be compelled to testify before a grand jury when his testimony may incriminate him under state law as well as federal law, but immunity from prosecution under state law is not granted.

3. Whether petitioner may be compelled to give testimony which may incriminate him to a grand jury before it is clear that an immunity statute attaches.

4. Whether petitioner received a fair trial.

5. Whether petitioner committed a contempt in the presence of the court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The relevant Constitutional provisions, statutes and rules are the Fifth and Sixth Amendments to the Constitution of the United States, 47 U. S. C. Sections 203(c), 409(l) and 501, and Rule 42, Federal Rules of Criminal Procedure. They are set out in Appendix D, *infra*, pp. 19a-22a.

STATEMENT OF THE CASE.

On October 19, 1963, petitioner was held as a material witness on $25,000 bail and was served with a Commissioner's subpoena to appear as a witness before the Commissioner on October 25, 1963, at 2:30 o'clock P. M. to testify in a proceeding before him. On October 24, 1963, petitioner was served with a subpoena to appear as a witness in a grand jury investigation in connection with possible violations of the United States Criminal Code. On October 25, 1963, at about 10:45 o'clock A. M., petitioner was served with another subpoena to appear "forthwith" as a witness in a grand jury investigation in connection with possible violations of 18 U. S. C. § 1952, 18 U. S. C. § 371 and 47 U. S. C. § 501 (Appendix C, *infra*, pp. 16a-17a).

On October 25, 1963, the assistant United States Attorney appeared in open court and stated to the district judge that petitioner had refused to answer certain questions before the grand jury relying on his privilege of self-incrimination (2a-3a).[1] The court ascertained that the petitioner was without counsel but desired to be represented (4a). It then offered petitioner a ten-minute recess to contact his attorney, and informed him that it did not intend to hold the matter over much beyond noon (5a-6a). Court recessed at 11:48 o'clock A. M. and reconvened at 12:18 o'clock P. M., when petitioner had a lawyer present.

At that time, the grand jury reporter read into the record that petitioner had testified to his name and address but had refused to answer questions as to whether he had an attorney, whether he had sought legal advice in connection with his appearance before the grand jury, whether he wanted counsel, whether he was married, what his age

1. References followed by the letter "a" are to the appendix filed by petitioner in the Court of Appeals. That Court, in listing the appeal specially for argument, had directed the filing of typewritten briefs and appendices by the parties.

was; and whether he had received a subpoena to appear that morning (8a-11a).

The government contended that petitioner could not give a "blanket refusal" to answer (11a-12a). Counsel for petitioner stated that petitioner would answer the questions (12a), and the court then directed him to return to the grand jury and to answer "any questions that will not tend to incriminate you" (12a-13a). Court was adjourned at 12:25 o'clock P. M. (14a).

Court was reconvened at 1:59 o'clock P. M. of the same day (14a). At that time a request was made to compel the petitioner to answer other questions. Petitioner had been asked and refused to answer before the grand jury on the ground of self-incrimination: whether he rented or has a summer residence or stayed at a summer residence at a specific address in Ventnor, New Jersey; whether he rented, owned or went to that home in the summer of 1963; whether he ever went to that address from May, 1963, to date; whether he has a phone number at that address; whether the phone number is 822-4840; whether he used the phone at that address on or about September 7, 1963, to call a Howard number in Philadelphia; what was the purpose of the call; what did he say on that call; whether his home phone number at a specific address in Philadelphia is DE or Dewey 4-0895; whether on September 5, 1963, he called from that home phone in Philadelphia to Pennsgrove, New Jersey, a specific number in Pennsgrove; whom he talked with on that call; what was the purpose of that call; whether on September 11, 1963, he called a specific number in Salem, New Jersey, from his home phone in Philadelphia; and whom he called at that Salem number on that date (16a-24a).

After the first few questions, petitioner consulted his counsel and upon his return again relied on his privilege in refusing to answer (17a). Government counsel then stated to him that the grand jury was inquiring into possible violations of the law of the United States which prohibits travel or any use of such facility as telephone in

connection with any extortion in violation of the laws of Pennsylvania and New Jersey, any possible conspiracy to violate that law and also any violations or conspiracies to violate 47 U. S. C. § 501, a part of the Federal Communications Act "which makes it an offense to use any telephone, facility—any telephone—for an unlawful or illegal purpose" (17a-18a). Government counsel also advised petitioner that "That same statute grants you immunity for any testimony that you may give before this Grand Jury, in any court, from prosecution for any offense which you may give answer to that may incriminate you, even before this Grand Jury" (18a). Thereafter petitioner consulted his counsel and refused to answer the remaining questions, again asserting his privilege.

Government counsel requested the district court to compel petitioner to answer, on the ground that since these questions "obviously" relate to possible violations of 47 U. S. C. § 501, petitioner was "fully immunized" (24a). The court then stated to petitioner that he is completely immune from prosecution for "anything concerning which you testified to before this Grand Jury, and I therefore direct you to answer the questions of the United States Attorney" (24a-25a).

At this point in the proceeding petitioner's counsel said that petitioner had advised him that "rather than sending him back upstairs again and coming back down, that he does not intend to answer the questions" (25a). The court then asked petitioner whether it is his intention to refuse to answer the questions directed to him by the United States Attorney, to which petitioner replied that he refused to answer any more questions (25a).

The court *immediately* adjudged petitioner in contempt of court and directed that he be committed to custody until such time as he purges himself (25a). The court recessed at 2:13 o'clock P. M. (26a).

On the same day, a judgment and commitment was filed in the district court (27a). Thereafter, on October

28, 1963, notice of appeal was filed, and on October 31, 1963, the district judge filed a certificate pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

On November 1, 1963, after the court below had specially listed the appeal for argument on November 6, the same grand jury which petitioner was under compulsion to testify before returned an indictment[2] charging petitioner and eight other individuals with conspiracy to violate 18 U. S. C. § 1952 and violation of 18 U. S. C. § 1952. One co-defendant was also charged, in one count, with violation of 47 U. S. C. §§ 203(c) and 501 by causing the telephone company to extend to him facilities for telephone communication which were not scheduled in its tariff.[3]

The fact of the indictment was fully briefed and argued before the court below.[4]

The court below, in a brief opinion filed on November 8, 1963, affirmed the judgment of the district court in the light of that court's decision in *Marcus v. United States*, 310 F. 2d 143. The affirmance was declared to be "without prejudice to the right of [petitioner] to apply to the district court for such relief as may be necessary and proper in the light of any events which have occurred since the imposition of sentence" (Appendix A, *infra*, p. 1a).

On the same day, November 8, counsel for petitioner made an oral application for relief to the district judge who had adjudged petitioner in contempt.[5] In refusing relief, the district judge stated:

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2. The indictment is "Exhibit A" attached to the Government's Reply to the Petition for Rehearing in the court below.

3. Subsequently the indictment was dismissed as to that co-defendant on application of the government.

4. The Government's Reply to Petition for Rehearing filed in the court below makes this statement in Paragraph 3 thereof.

5. The transcript of that proceeding is contained in the "Addendum" included in petitioner's printed "Petition for Rehearing and Addendum" filed in the court below. The statement quoted in the text appears in the "Addendum" on page 11; in the original transcript it is on page 7.

". . . I sent this man to prison for contempt, and I sent him to prison until he should purge himself of contempt, and I denied bail. Nothing has happened in the meantime qua that contempt, and qua the refusal to testify, that would in any way purge him of contempt for which he is now in jail.

The fact that he has been indicted, in my judgment, does not at all affect his obligation to testify before the grand jury, for which he will not only have immunity, but on the promise of the United States attorney, if the matter is brought to me I will approve a nol-pros or a dismissal of the indictment if he agrees to purge himself of contempt; then he will be able to get out of jail, come in, testify, and be free."

Petitioner filed a Petition for Rehearing in the court below with respect to its decision of November 8.[6] That petition was denied on January 14, 1964, two judges dissenting (Appendix A, *infra*, pp. 1a, 2a).

REASONS FOR GRANTING THE WRIT

This case presents issues of substantial importance in the preservation of fundamental rights and to the administration of criminal justice in the federal courts.

1. The sentence imposed upon the petitioner was that he remain in custody until he purges himself of the contempt by appearing before the grand jury and answering all questions put to him. Shortly after his conviction of contempt, petitioner was indicted for conspiracy to violate

6. Petitioner had taken an immediate appeal from the denial of relief by the district judge. That appeal was dismissed by the court below solely on the ground that the district court was without jurisdiction since the mandate of the Court of Appeals had not issued at the time the application for relief was made to and denied by the district judge.

18 U. S. C. § 1952 and violation of 18 U. S. C. § 1952 by the same grand jury he was under compulsion to testify before.

In his dissent in *Piemonte v. United States*, 367 U. S. 556 (1961), at pages 565-566, Justice Douglas (Justice Black concurring) stated:

> "Once an indictment was returned, the proceedings of this grand jury became a part of a criminal prosecution directed against petitioner. *Counselman v. Hitchcock*, 142 U. S. 547, 562; *United States v. Monia*, 317 U. S. 424, 427. When the citizen is formally accused by indictment, he has a constitutional right to stand mute and to refuse to testify. His right not to take the stand in a federal criminal trial transcends his privilege against self-incrimination. No immunity statute, no pressure of government, no threats of the prosecution can be used to deprive the citizen of his right. See *Wilson v. United States*, 149 U. S. 60; *Stewart v. United States*, 366 U. S. 1. And it is unthinkable that a district judge would ever hold a defendant in contempt because h refused to take the stand at his own trial. The district judge did no such thing here. But that was the posture of the case when it was decided by the Court of Appeals. For by then the matters about which petitioner refused to answer had become in form and in effect an indictment against him.
>
> There is no power in our free society to compel a person to talk about a matter on which he has been indicted or to penalize him for failure to do so. We might as well say that an accused can be committed for contempt or failure to take the stand at his own trial.

We are advised that after we granted certiorari the indictment against petitioner was dismissed on motion of the Government for lack of evidence. That

seems irrelevant. The truth is that the grand jury before which petitioner was summoned did indict him. Petitioner was in fact held in contempt for refusal to testify in a criminal proceeding against him. That is not permissible under the procedures of our free society whatever may have been the ultimate fate of that criminal proceeding."

Since the indictment in that case had been dismissed on motion of the government after *certiorari* was granted, we believe that the majority opinion does not control the instant case. A separate dissent by Chief Justice Warren, with Justice Douglas concurring, concluded that the petitioner in that case was subjected to unjustifiable harassment.

The instant case does not involve a defendant who has already been convicted and sentenced and therefore cannot be further punished. The indictment against petitioner here is pending and petitioner is awaiting trial, which is imminent, even though he is confined to prison during this period on the contempt charge. It is clear that the proceedings of the grand jury, before which petitioner is under compulsion to testify, are a part of the criminal prosecution against him and that his claim of self-incrimination was justified.

The per curiam opinions of the court below do not elucidate the basis of the decision, other than reliance on *Marcus v. United States*, 310 F. 2d 143 (3d Cir. 1962), cert. denied, 372 U. S. 944. Two of the members of the court below, Chief Judge Biggs and Judge Kalodner, expressly point out that the *Marcus* case has no application to this issue. Their separate opinions dissenting from the denial of rehearing emphasize the importance of the issue created by the indictment (Appendix A, *infra*, pp. 2a, 12a).

2. Petitioner's risk of prosecution under state law is real and substantial. Indeed, an essential ingredient of 18 U. S. C. § 1952 is violation of state laws, and petitioner has been so charged in the indictment filed against him.

The court below merely cited its decision in *Marcus v. United States, supra,* in answer to all of petitioner's contentions including the contention, which petitioner here reiterates, that 47 U. S. C. § 409(l), even if applicable, does not extend the grant of immunity to state prosecutions. In *Marcus*, however, this issue was not presented to this Court on application for certiorari, 372 U. S. 944. The Court of Appeals in *Marcus* cited *Reina v. United States*, 364 U. S. 507 (1960), for the proposition that the immunity extends to state prosecutions. 310 F. 2d, at p. 148. But in *Reina* this Court relied upon the specific words of 18 U. S. C. § 1406, that compelled testimony shall not be used as evidence in "*any* criminal proceeding . . . against him in *any* court . . . ." (emphasis supplied) for its holding that that immunity statute covered both federal and state prosecutions. This is also true of *Adams v. Maryland*, 347 U. S. 179 (1954), and *Ullmann v. United States*, 350 U. S. 422 (1956) with respect to the immunity statutes there involved. The Court of Appeals in *Marcus* failed to observe that 47 U. S. C. § 409(l) does not contain such words, and therefore does not extend the immunity so that petitioner's compelled testimony could not be used against him in a criminal proceeding in a state court. Unlike *Brown v. Walker;* 161 U. S. 591, 608 (1896), where the Supreme Court regarded the risk of state prosecution as imaginary and insubstantial, in this case the risk is obvious, substantial and probable. This case is here because of the unwillingness of the courts to give full and ungrudging effect to the command of the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

It is noted that certiorari has been granted by this Court in *Murphy v. New York Harbor Waterfront Commission*, No. 138, October Term 1963, which involves the question, whether a witness is protected where he obtains immunity from state prosecution but not federal prosecution. Here, petitioner submits the question, whether a

witness is protected against self-incrimination where he is given immunity against federal prosecution but the statute does not provide protection against state prosecution. *United States v. Murdock*, 284 U. S. 141 (1931), must now be re-examined. See Grant, Federalism and Self-Incrimination, Part 1, 4 U. C. L. A. L. Rev. 549; *id.*, Part 2, 5 U. C. L. A. L. Rev. 1; Grant, Immunity from Compulsory Self-Incrimination in a Federal System of Government, 9 Temple L. Q. 57, 194, and 212.

3. Immunity is granted by 47 U. S. C. § 409(l) only when the testimony is elicited in "a case or proceeding . . . based upon or growing out of any alleged violation of [The Federal Communications Act]". The Fifth Amendment privilege is properly asserted when a witness is first called upon to give an answer which may tend to incriminate him. *Hoffman v. United States*, 341 U. S. 479 (1951). Therefore, the constitutional privilege may not be removed unless it is clear that immunity will result: judged at the time immunity is asserted as a defense, it may be non-existent. See, Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1578-1582, 1595-1598. *Cf. In re Parr*, 304 F. 2d 631 (D. C. Cir. 1962), where the witness was committed to jail until such time as he answered questions and produced evidence before the grand jury, the term of commitment not to exceed six months—see *In re Philip Bart*, 7 L. Ed. 2d 767, 82 S. Ct. 675 (1962); *United States v. Onassis*, 125 F. Supp. 190 (D. C. D. C. 1954).

In *Marcus v. United States*, *supra*, relied on by the Court below, the grand jury was investigating, *inter alia*, violations of 18 U. S. C. § 1084, which prohibits one *engaged in the business* of wagering from use of a wire communication facility for interstate transmission of wagers or information assisting the placing of wagers. It was specifically determined that "The questions asked plainly showed that the inquiry was concerned, *inter alia*, with

unlawful use of telephones to transmit gambling information." 310 F. 2d, at p. 145. The court there determined that the "nature of the questions themselves which Marcus refused to answer plainly shows that unlawful use of telephone communication in connection with gambling and racketeering was involved". 310 F. 2d, at p. 148. And, indeed, the record in that case discloses numerous specific and direct questions as to whether the witness had a business telephone service in connection with interstate gambling operations, or to transmit or receive race results.

In the case *sub judice*, the few questions put to petitioner do not reveal the nature of the inquiry. The only basis for invoking the immunity provision, and thereby denying the petitioner his constitutional privilege against self-incrimination, is the declaration of the prosecutor that the subject matter of the grand jury investigation concerns possible violations of 18 U. S. C. § 1952 and the Federal Communications Act.[7]

This is entirely too tenuous as a basis for depriving him of a privilege founded directly upon the Constitution. The statute granting immunity under certain limited conditions cannot be converted into a general immunity statute by the device of asking a few general questions about the telephone. In this proceeding the government has made no serious attempt to show how the Federal Communications Act may be involved.

The result reached by the court below, on the facts of this case, conflicts with *In re Bart*, *supra*, where a showing was required to be made before the immunity statute became operative.

4. When petitioner was first served with a subpoena to testify before the grand jury, that notice did not refer

7. In the district court, government counsel stated that § 501, Title 47, U. S. C., makes it an offense to use any telephone for an unlawful purpose. This plainly is not so. See the dissenting opinion of Judge Kalodner as to the theory of the government, Appendix A, *infra*, pp. 2a, 7a-9a.

to the Communications Act. The "forthwith" subpoena served on him did. The government, when it first brought petitioner into court, asserted only that petitioner could not give a "blanket refusal" to testify. Only after petitioner, having answered certain questions, refused to answer others, did the government assert the immunity statute.

In the short space of fourteen minutes, petitioner, whose counsel had been hastily pressed into service, became involved in a proceeding which commenced as application by the government for a direction to answer questions before the grand jury on the ground of immunity, when petitioner suddenly found himself adjudged guilty of contempt and committed for refusing to answer the questions. Petitioner had no trial. He had no notice. He had no opportunity to prepare his defense and to defend, for example, by showing that the immunity offered was doubtful, that there was no showing that the grand jury was investigating violations of the Federal Communications Act, and that there was no obstruction of justice, etc. Lacking was any opportunity for petitioner to even explain or justify his "refusal" to answer. Petitioner had no opportunity to demand a jury trial and to contest the proceedings.

If petitioner's contentions are valid he cannot be committed to jail merely because the district judge has directed that he be held until he purges himself, rather than for a fixed term. This is a criminal contempt proceeding as the district judge himself stated under Rule 42(a) of the Federal Rules of Criminal Procedure. According to the government's philosophy of the law, if the district judge in *Hoffman v. United States, supra*, had sentenced the defendant to remain in jail until he answered the questions instead of a fixed term of five months' imprisonment he could not have been discharged. The same defenses that are available to a witness who has been improperly sentenced to a fixed term of imprisonment are available to one who has been improperly sentenced, as here, to imprison-

ment until he answers questions propounded to him by the United States Attorney before the grand jury, whether the contempt is considered criminal, as here, or civil, as in *In re Bart, supra.*

The instant case is not like *Brown v. United States,* 359 U. S. 41 (1958), where the district court afforded the petitioner notice and opportunity to prepare, defend and argue. And *Marcus v. United States, supra,* was a proceeding under Rule 42(b), F. Rules Crim. Pro.

5. Petitioner was not guilty of contempt in the presence of the court. The court merely asked petitioner whether he intended to answer, to which he replied that he did not, but the questions were not put to petitioner after he was directed to answer, and he therefore did not fail to answer them. Petitioner here submits that the *intention* is not the *offense.* In *Brown v. United States, supra,* the court put the questions to the petitioner, and therefore the case is inapposite.

CONCLUSION.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

January, 1964.

APPENDIX A.

Opinion of the Court.

(Filed November 8, 1963)

Argued November 6, 1963

Before STALEY, HASTIE and SMITH, *Circuit Judges*.

PER CURIAM.

Pleading privilege against self-incrimination, appellant refused to answer certain questions put to him as a witness before a grand jury. Brought before the court below, he persisted in this refusal despite the court's explanation to him that pursuant to 47 U. S. C. § 409(*l*), he would be immune from any prosecution by reason of any testimony he might give. After the appellant in the presence of the court had categorically refused to obey the court's command, the court ordered him committed to prison until he should purge himself by obeying the court. This appeal followed.

In the light of our decision in Marcus v. United States, 310 F. 2d 143 (C. A. 3, 1962), we find no merit in any of the arguments advanced by appellant. Accordingly, the judgment will be affirmed but without prejudice to the right of the appellant to apply to the district court for such relief as may be necessary and proper in the light of any events which have occurred since the imposition of sentence.

Opinion of the Court.

On Petition for Rehearing

(Filed January 14, 1964)

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH, *Circuit Judges*.

PER CURIAM.

Upon consideration of the petition for rehearing in this case and the government's reply thereto, the petition for rehearing will be denied.

KALODNER, *Circuit Judge*, dissenting.

The appellant was brought before the District Court because of his refusal to answer certain questions as a Grand Jury witness on the ground of self-incrimination. In a brief hearing the Assistant United States Attorney asserted that since the questions "obviously" related to possible violation of 47 U. S. C. § 501, the witness was immune to prosecution under 47 U. S. C. § 409(l). The District Judge thereupon directed the appellant to answer the questions of the United States Attorney. Counsel for the appellant said that the latter had previously told him that he did not intend to answer the questions. The Court then asked appellant his intention, to which he replied: "I refuse to answer any more questions, Your Honor." Thereupon, the Court held him in contempt and directed that he be committed until he purge himself. This occurred on October 25, 1963. After the appeal was taken the District Judge filed a certificate under Rule 42(a) F. R. Crim. P. The appeal was especially listed for argument on November 6, 1963.

On November 1, 1963, the same grand jury returned an indictment against the appellant, charging him with conspiracy to violate 18 U. S. C. § 1952 and travelling in interstate commerce in violation of 18 U. S. C. § 1952. This indictment was brought to the attention of this Court in the brief for the appellant.

On November 8, 1963 in a per curiam opinion, this Court affirmed the District Court's judgment in the light of Marcus v. United States, 310 F. 2d 143 (3 Cir. 1962), cert. den. 372 U. S. 944 (1963). It added, however, that such affirmance is "without prejudice to the right of the appellant to apply to the district court for such relief as may be necessary and proper in the light of any events which have occurred since the imposition of sentence." On the same day the appellant applied to the District Court for relief, based upon the subsequent indictment, but such relief was immediately denied.[1]

All of this information comes from the record on the appeal in this case, supplemented by the Petition for Rehearing, and the Answer filed by the Government, which includes a copy of the indictment.

The per curiam opinion of this Court in this appeal suggests, if it does not direct, that appellant should apply to the District Court for relief based on the indictment filed after he was held in contempt. But whether this was necessary or desirable is itself questionable. Cf. Bartone v. United States, 375 U. S. 52 (1963).

Implicit in the Court's per curiam opinion, is its holding that the filing of the indictment subsequent to the contempt adjudication, (fully argued at the hearing of the appeal as the Government concedes in its brief), was not of such proportion as to compel vacation of the contempt commitment.

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1. A separate appeal from that order was taken at our No. 14,674, but the appeal was dismissed for want of jurisdiction in the District Court to act since the mandate of this Court had not issued with respect to our opinion of November 8, 1963.

I do not agree with the view expressed in our per curiam opinion that *Marcus* is dispositive here, since the indictment which followed the contempt commitment, which is clearly before us on this appeal, distinguishes the instant case from *Marcus*. The circumstance of the indictment presents a novel, substantial issue which compels specific disposition by this Court. Pertinent is the expression of Mr. Justice Douglas (concurred in by Mr. Justice Black) in his dissenting opinion in Piemonte v. United States, 367 U. S. 556 (1961) at pages 565-566:

> "Once an indictment was returned, the proceedings of this grand jury became a part of a criminal prosecution directed against petitioner. *Counselman v. Hitchcock*, 142 U. S. 547, 562; *United States v. Monia*, 317 U. S. 424, 427. When the citizen is formally accused by indictment, he has a constitutional right to stand mute and to refuse to testify. His right not to take the stand in a federal criminal trial transcends his privilege against self-incrimination. No immunity statute, no pressure of government, no threats of the prosecution can be used to deprive the citizen of this right. See *Wilson v. United States*, 149 U. S. 60; *Stewart v. United States*, 366 U. S. 1. And it is unthinkable that a district judge would ever hold a defendant in contempt because he refused to take the stand at his own trial. The district judge did no such thing here. But that was the posture of the case when it was decided by the Court of Appeals. For by then the matters about which the petitioner refused to answer had become in form and in effect an indictment against him.
>
> "There is no power in our free society to compel a person to talk about a matter on which he has been indicted or to penalize him for failure to do so. We might as well say that an accused can be committed for contempt for failure to take the stand at his own trial.

"We are advised that after we granted certiorari the indictment against petitioner was dismissed on motion of the Government for lack of evidence. That seems irrelevant. The truth is that the grand jury before which petitioner was summoned did indict him. Petitioner was in fact held in contempt for refusal to testify in a criminal proceeding against him. That is not permissible under the procedures of our free society, whatever may have been the ultimate fate of that criminal proceeding."

It must be observed that the majority opinion in *Piemonte* did not advert to the fact that there an indictment had been returned after the contempt commitment, presumably because the indictment pending when certiorari was granted, had been dismissed on the government's motion prior to the Supreme Court's disposition. Since in the instant appeal the indictment which followed the contempt commitment is still pending, the views expressed by Justices Black and Douglas are assuredly of sufficient significance and weight to require their consideration by this Court. For my part, I am in accord with the views of Justices Black and Douglas.

I am further of the opinion that this Court should give merited consideration to the very substantial question as to whether *Marcus* is dispositive here for these further reasons:

In *Marcus*, we noted particularly that, "The questions asked plainly showed that the inquiry was concerned, *inter alia*, with unlawful use of telephones to transmit gambling information," and that, "The nature of the questions themselves which Marcus refused to answer plainly shows that unlawful use of telephone communication in connection with gambling and racketeering was involved." 310 F. 2d, at pp. 145, 148.[2] In this case, the questions put to

2. Indeed, the record in the Marcus case discloses explicit questions as to whether the witness used his telephone service in connec-

the appellant were not self-revealing; he was asked whether he owned, rented or visited a summer place in New Jersey, whether he made certain specific calls to specific numbers, and, as to some, whom he spoke to and the purpose. Nothing is apparent from these questions, least of all that they concerned any alleged violation of the Federal Communications Act, as in *Marcus*.

Immunity is granted by 47 U. S. C. § 409(l) only when the testimony is elicited in "a case or proceeding . . . based upon or growing out of any alleged violation of [the Federal Communications Act]." See *Marcus*, 310 F. 2d at p. 145. Since the Fifth Amendment is properly asserted when a witness is first called upon to give an answer which may tend to incriminate him, it seems to me that a witness may not be shorn of his constitutional privilege unless it is clear that co-extensive immunity will result. For, judged at the time immunity is asserted as a defense to a prosecution, it might not be found to exist if for no reason other than the want of substantial relation. See United States v. Onassis, 125 F. Supp. 190 (D. C. D. C. 1954); Note, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568 (1963); and also, In re Bart, 304 F. 2d 631 (D. C. Cir. 1962).

Here, the appellant could properly rely on the Fifth Amendment to refuse to answer the questions put to him. This is not questioned by the Government. An answer could well form a link in the chain of evidence against him with respect to 18 U. S. C. § 1952, one of the objects of this Grand Jury's investigation as declared by the Government counsel. Section 1952 does not contain an immunity provision.

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tion with interstate gambling operations; whether he used his telephone service to transmit or receive race results; and whether he was aware that the tariff filed by his telephone company states that service is furnished subject to the condition that it will not be used for an unlawful purpose.

However, I am not prepared to say that the mere declaration by Government counsel that one of the purposes of the investigation concerns violations of the Federal Communications Act affords a sufficient basis upon which the immunity provision of the Act may be invoked to deprive the appellant of his constitutional privilege. In my view the questions put to the appellant do not advance the Government's claim that immunity would necessarily or even most probably apply. In *Marcus*, despite the rather broad language of the opinion, we were evidently satisfied that the nature of the questions left no doubt as to the object of the inquiry. The instant case falls far short of *Marcus* in this respect.

Further, it is not clear by any means how the Federal Communications Act is here involved.

The record discloses that before the Grand Jury the appellant was advised by Government counsel that, "The Grand Jury is inquiring into the following matters: One, possible violations of the law of the United States which prohibits travel or the use of any facility such as telephone in connection with any extortion in violation of the laws of the State of Pennsylvania and New Jersey. The Grand Jury is also inquiring into any possible conspiracy to violate that law, and also any violations or conspiracies to violate Title 47 of the United States Code, § 501, which is part of the Federal Communications Act which makes it an offense to use any telephone, facility—any telephone—for an unlawful or illegal purpose."

The appellant could well understand how his answer to a question concerning his telephone number, or whether he placed a particular telephone call to another number and to whom he spoke, might tend to incriminate him under 18 U. S. C. § 1952, but not as to 47 U. S. C. § 501. The latter statute does not directly make it an offense to use the telephone for an illegal conversation.

It is plain from the argument of the Government in *Marcus*, as well as from the indictment here involved (only

count 8 of which concerns the Federal Communications Act but does not charge appellant with such violation) that the theory of the Government is as follows: 47 U. S. C. § 501 makes it unlawful for anyone knowingly and wilfully to do or cause or suffer to be done that which is prohibited by the Act; § 203 of the Act requires a telephone company (a "carrier") to file a tariff, prohibits the company from engaging in communication unless a tariff is filed, and also prohibits it from extending to any person any facility or privilege except as specified in the tariff; since the company's tariff, as filed, in some manner restricts its service or facility to exclude unlawful purposes, one who knowingly and wilfully uses a telephone service for unlawful purposes may come within § 501.[3]

I have two reservations which are, to me, stumbling blocks to the acceptance of our conclusion in this case. First, unlike *Marcus*, the questions here involved do not in any way whatsoever show any alleged violation of the Federal Communications Act. And the mere use of a telephone for interstate communication does not, *ipso facto*, involve that Act. Second, if the Government is here suggesting that an illegal conversation over the telephone, i.e., a conversation in violation of 18 U. S. C. § 1952, for example, puts the telephone company in violation of its

3. Neither below, nor in this Court, is this spelled out by the Government. Before the Grand Jury and the District Court the Government merely stated that 47 U. S. C. § 501 made it unlawful to use the telephone for an unlawful purpose. In this Court, in its Answer to the Petition for Rehearing, the Government stated, "It is alleged that the indictment and the questions asked petitioner [appellant] clearly show the use of interstate telephones for the purpose of extortion which would be an unlawful use of the said telephones *and a violation of the tariff filed in the Federal Communications Commission by the telephone company*." (Emphasis added.) The tariff is not in evidence in this case.

Of course, the indictment was not before the District Court when it held the appellant in contempt. I do not agree that the questions asked of the appellant here show the use of interstate telephones for the purpose stated.

tariff so that the user is in violation of 47 U. S. C. § 501 as well as 18 U. S. C. § 1952, then the Government is going beyond *Marcus*, or any other case I have been able to find, and a new issue is *presented not reached* by our *Marcus* decision. I seriously question whether a single telephone call, or even sporadic telephone calls, as distinguished from the *regular* use of a telephone service for, say, the transmission of wagering information or other unlawful purposes as in *Marcus*, "causes" the telephone company to provide an unlawful service so as to put the one who makes the calls within § 501.

Here, as in *Marcus*, appellant contends that the immunity granted by 47 U. S. C. § 409(l) is not coextensive with his privilege under the Fifth Amendment because the immunity is not applicable to state prosecution. In *Marcus* we rejected that contention relying on Reina v. United States, 364 U. S. 507 (1960). However, a different statute, the Narcotic Control Act, 18 U. S. C. § 1406, was there involved. In holding that § 1406, granted immunity from state prosecution the Supreme Court concluded that its *specific* provision that the compelled testimony shall not "be used as evidence in *any* criminal proceeding . . . against him in *any* court . . ." covered both federal and state courts. 364 U. S. at p. 510. In Marcus we apparently did not consider that the specific statutory language, to wit, "in any court" relied upon by the Supreme Court in *Reina* is *not* contained in 47 U. S. C. § 409(l).[4]

4. For comparison, the relevant portions of the two statutes are here set out: 18 U. S. C. § 1406. ". . . But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court." 47 U. S. C. § 409(l): ". . . But no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, . . ."

It compels observation that in *Reina* the Supreme Court chose to premise its holding that state immunity was granted by the specific terms of § 1406, and not on the holding, in that case, by the District Court and the Court of Appeals that assuming only federal immunity was granted by the statute that United States v. Murdock, 284 U. S. 141 (1931) had settled that the Fifth Amendment does not protect a federal witness from answering questions which might incriminate him under state law.

It is not without significance and relevance here that the Supreme Court in premising its decision on the statutory language instead of *Murdock* said in *Reina*:

> "Petitioner contends that *Murdock* should be re-examined and overruled. We have no occasion to consider this contention, since in our view § 1406 constitutionally grants immunity from both federal and state prosecutions." 364 U. S. 510.

In two other immunity statute cases which preceded *Reina*, the Supreme Court also premised their holding that they granted state as well as federal immunity on the specific statutory provision in each that the use of the compelled testimony could not be used ". . . in any criminal proceeding . . . in any court . . ." See Ullmann v. United States, 350 U. S. 422 (1956), and Adams v. Maryland, 347 U. S. 179 (1954). In *Ullmann*, the critical statute was the Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. A. § 3486; and in *Adams*, the predecessor Immunity Act of 1948, 62 Stat. 833, 18 U. S. C. A. § 3486.

I do not think that it is judicial insubordination to venture the opinion that implicit in the Supreme Court's premising of its disposition in *Reina*, *Ullmann* and *Adams* on the circumstance that the immunity statutes there concerned extended immunity to state offenses by reason of the statutory provision "in any court" is the evidencing of a change in doctrinal trend from earlier decisions that

the Fifth Amendment affords no protection against self-incrimination of a state offense when testimony is compelled under federal immunity statutes sans express statutory provision against the use of such evidence "in any criminal proceeding . . . in any court."

In the instant case, especially since inquiry into violations of 18 U.S.C. § 1952 was an express objective of the Grand Jury investigation, and appellant has been indicted under that statute, involving as it does extortion under state law, the risk of state prosecution is genuine. Accordingly, we must here go further than *Marcus*: we must hold that the omission from § 409(l) of the critical words "in any criminal proceeding . . . against him in any court" contained in the statute involved in *Reina* is without relevance, or we must decide that the privilege of the Fifth Amendment does not protect a federal witness from answering questions which might incriminate him under state law. These issues are squarely posed by the instant case. The former was not an issue, and the latter was expressly left open, in the *Reina* decision. I do not believe either can or should be disposed of on the basis of *Marcus*, nor do I believe either should be disposed of by silence.

Finally, I have substantial reservations that a contempt was committed in the presence of the court and which the court should have dealt with under Rule 42(a), F. R. Crim. P. The certificate filed by the District Court pursuant to that rule recites that the appellant was directed to return to the Grand Jury and answer the questions propounded, and that the appellant stated he would refuse to answer those questions or any more questions. The transcript of the record, however, discloses that the District Court directed appellant to "answer the questions of the United States Attorney." Counsel for appellant repeated to the Court that appellant had told him, rather than go to the Grand Jury room and return, that he did not intend to answer the questions. The District Court then inquired of

appellant whether "it is your intention to refuse to answer the qfestions directed to you by the United States Attorney?" to which appellant replied, "I refuse to answer any more questions, Your Honor." Appellant was then held in contempt and committed. I have substantial reservations that the *intention* of appellant to refuse to answer if brought before the Grand Jury constituted a contempt in the presence of the Court. I do not believe that the procedure may be short-circuited in this way: the intention to commit an offense is not the same as committing the offense.

Moreover, *Marcus* was a 42(b) proceeding, and I am of the view that the appellant here, in all the circumstances, was entitled to notice, an opportunity to prepare his defense and to defend himself, including an offer to the Court of such explanation as he may have for his refusal to answer if he be required to answer. These protections are afforded by Rule 42(b). Certainly, the problems raised were not so factually and legally clear as to justifiably premise the fourteen-minute[5] determination of guilt made under 42(a). Cf. Panico v. United States, 375 U. S. 29.

For the reasons stated I am of the opinion that the petition for rehearing should be granted and accordingly dissent from its denial.

BIGGS, *Chief Judge*, dissenting.

I too must respectfully dissent for the following reasons. Assuming *arguendo* that Testa was guilty of contempt when he refused to answer the questions put to him in the court below, the order committing him until he has purged himself of his contempt may have become un-

5. According to the transcript of the record, the proceeding resulting in the judgment appealed from commenced at 1:59 o'clock p.m. and concluded at 2:13 o'clock p.m. the same day.

forceable by reason of his indictment. If he purges himself by answering the questions put to him he could, possibly, under the compulsion of the continuing contempt sanction, be compelled to testify against himself. This question was not adjudicated in Marcus v. United States, 310 F. 2d 143 (3 Cir. 1962), and as Judge Kalodner points out in his dissent here, was not regarded as an issue in the opinion of the Supreme Court in Piemonte v. United States, 367 U. S. 556 (1961), because the indictment there had been quashed prior to argument of the appeal.

The issue seems to me to be of such importance as to warrant rehearing. I therefore join in Judge Kalodner's request for a rehearing, which I assume, is to be one en banc.

APPENDIX B.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed October 25, 1963 in this case be, and the same is hereby affirmed but without prejudice to the right of the appellant to apply to the district court for such relief as may be necessary and proper in the light of any events which have occurred since the imposition of sentence.

ATTEST:

IDA O. CRESKOFF,
Clerk.

November 8, 1963

Sur Petition for Rehearing.

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*.

The petition for rehearing filed by Philip Charles Testa, Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

STALEY,
Judge.

Dated: January 14, 1964

APPENDIX C.

Commissioner's Subpoena.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN PENNA.

UNITED STATES OF AMERICA

v.

ANGELO BRUNO, IGNAZIO DENARO, HAROLD KONIGSBERG, JOSEPH JULIANO, ARMAND COLAINNI, SAM JAMES ROBERTS.

To Philip C. Testa
Name of witness

You are hereby commanded to appear before the undersigned United States Commission at 4060 U. S. Court House on the 25 day of Oct., 1963 at 2.30 o'clock P. M. to testify in the above entitled proceeding.

EDWARD W. FUNG,
United States Commissioner.

This subpoena is issued on the application of Drew J. T. O'Keefe, U. S. Aty. of Pa.

Date: Oct. 19, 1963.

Subpoena to Testify.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA

v.

GRAND JURY INVESTIGATION.

Re: Possible Violations of 18 U. S. C., § 1952; 18 U. S. C. § 371; and 47 U. S. C., § 501.

To Philip Testa
1012 Carpenter St.
Philadelphia, Pa.

You are hereby commanded to appear forthwith in the United States District Court for the Eastern District of Pennsylvania at Court Room No. 7, 3rd Floor, U. S. Courthouse, 9th & Market Sts. in the city of Philadelphia, on the 25th day of October, 1963 at 10:00 o'clock A. M. to testify in the above-entitled case.

This subpoena is issued on application of the United States.

W. HALTON SPANN,
Clerk.

By ALBERT M. DROBIL,
Deputy Clerk.

October 25, 1963.

ISAAC S. GARB, Asst. U. S. Attorney
for Eastern Dist. of Pa.
4042 U. S. Court House, Phila., Pa.
Address

Appendix C

RETURN.

Received this subpoena at Phila., Pa., 10:45 A. M. on 10/25/63 and on 10/25/63 at Phila., Pa., I served it on the within named by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.

JOSEPH A. VERICA,
Special Agent, FBI.

By DONALD J. O'CONNOR,
Special Agent, FBI.

APPENDIX D.

Constitutional Provisions, Statutes and Rules Involved.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, * * *

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

Section 203(c) of the Communications Act of 1934, 48 Stat. 1070, 47 U. S. C. 203(c), provides in pertinent part:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall * * * (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

Section 409 of the Communications Act of 1934, 48 Stat. 1096, as amended, 66 Stat. 721, 47 U. S. C. 409, provides in pertinent part:

> (1) No person shall be excused from attending and testifying or from producing books, papers, sched-

> ules of charges, contracts, agreements, and documents before the [Federal Communications] Commission, or in obedience to the subpena of the Commission, * * * or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence * * * required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence * * * except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 501 of the Communications Act of 1934, 48 Stat. 1100, as amended, 68 Stat. 30, 47 U. S. C. 501, provides in pertinent part:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; * * *.

18 U. S. C. 1952, 75 Stat. 498, provides:

> § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000, or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Rule 42 of the Federal Rules of Criminal Procedure provides:

Rule 42. Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that

he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.